STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Extension Pipeline Company, L.L.C	)	
	)	
Application Pursuant to Section 8-503, 8-509 and	)	07-0446
15-401 of the Public Utilities Act/The Common	)	Upon Reopening
Carrier by Pipelines Law to Construct and Operate	)	
a Petroleum Pipeline and When Necessary to Take	)	
Private Property As Provided by the Law of	)	
Eminent Domain.	)	

PLIURA INTERVENORS' APPLICATION FOR REHEARING

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NOW COME the various landowner and Intervenors in the above-referenced cause who throughout these proceedings have been jointly referred to for convenience purposes as "Pliura Intervenors", by and through their attorney, Thomas J. Pliura, and pursuant to 83 Ill. Adm. Code Section 200.880 and 220 ILCS 5/10-113(a), respectfully submit this Application for Rehearing of the Illinois Commerce Commission's Final Order upon Reopening in the above-referenced Docket, dated December 17, 2014 and received by Pliura Intervenors via email notification from the Commission on December 18, 2014.

INTRODUCTION

Pliura Intervenors proposed most of the following recitation of facts as the "Background" section of its Alternative Language for the Proposed Final Order. It stands as an accurate summary of these convoluted, if not unprecedented, proceedings and relevant to why the Final Order should be reconsidered by the Commission.

On July 8, 2009, the Illinois Commerce Commission ("Commission") entered an Order in Docket No. 07-0446. ("2009 Order") The Commission therein ordered that Enbridge Pipelines (Illinois) L.L.C. (n/k/a Illinois Extension Pipeline Company, L.L.C. and referred to as "Applicant," "IEPC" or "Enbridge") was "granted a Certificate in Good Standing pursuant to Section 15-401 of the Common Carrier By Pipeline Law to operate as a common carrier by pipeline and that said Certificate in Good Standing shall be the following:"

> IT IS HEREBY CERTIFIED, subject to the conditions imposed in this order, that Enbridge Pipelines (Illinois) L.L.C. is authorized, pursuant to Section 15-401 of the Common Carrier By Pipeline Law, to construct, operate and maintain the proposed **36-inch pipeline** as described in this order and to operate as a common carrier by pipeline within an area sixty feet wide and extending approximately 170 miles along the route identified in Attachments A and B to the petition in Docket No. 07-0446. (Emphasis added)

It is noted that the Common Carrier by Pipeline Law, 220 ILCS 5/15-401(a) ("CCPL"), is part of the Public Utilities Act, 220 ILCS 5/1-101, *et seq*. ("PUA" or "Act").

The Commission further ordered that "the proposed pipeline is necessary and should be constructed, to promote the security or convenience of the public, pursuant to Section 8-503 of the Public Utilities Act." The Commission further ordered that "Petitioner's request under Section 8-509 of the PUA for authorization "to take or damage private property in the manner provided for by the law of eminent domain" is not granted in this docket."

The Order in Docket No. 07-0446 was appealed to the Illinois Appellate Court by some of the Intervenors in the case. The Order was upheld on appeal. *Pliura Intervenors v. Illinois Commerce Commission*, 405 Ill. App. 3d 199 (2010).

Thereafter, IEPC took no action at all on the project until 2012. Essentially, it was abandoned by IEPC because the market conditions had radically changed and demand for Canadian Heavy Crude delivered to the Patoka hub had disappeared. According to the motion to reopen and amend, this was due, in large part to the global downturn in the markets, though no evidence was presented on this issue. Though there was never a stay entered by any court, during all this time, the project lay dormant. Then, on July 22, 2013, IEPC filed its petition for eminent domain. Therein, IEPC asserted that it was again proceeding with the approved project following the "Great Recession", was at an impasse with 148 landowners in its attempts to obtain rights-of-way and thus required Eminent Domain authority to complete the project. IEPC made no mention of the project alteration in diameter, volume and product and made only a passing reference in a footnote to a route alteration.

The matter proceeded to an evidentiary hearing. However, the scope of the hearing was substantially limited. The Administrative Law Judge barred any evidence not related

specifically to the issue of good faith negotiations. No evidence, for example, of the numerous, catastrophic and fatal accidental incurred by Enbridge between the Final Order in 07-0446 and the 13-0446 proceedings or how land owner concerns over the potential for similar disasters was permitted.

At hearing, Pliura Intervenors presented testimony of five intervenor landowners who disputed Enbridge's good faith efforts to negotiate. Additionally, Counsel for Pliura Intervenors cross examined Enbridge's witnesses as to their alleged good faith negotiations and the failure of Enbridge's expert appraiser to study the value of the actual properties involved herein. Following the hearing, Pliura Intervenors filed proposed language for the final order that would result in a denial of the Application. Nevertheless, the Commission rejected Pliura Intervenors' proposed findings and instead issued a proposed order granting Eminent Domain Authority. Throughout all of these proceedings, IEPC never mentioned the alteration.

Thereafter, pursuant to 83 Ill. Adm. Code 200.830, Pliura Intervenors timely filed a statement of exceptions to the proposed order. Enbridge and the Commission staff also filed statements of exceptions that were largely typographical in nature. Again, there was no mention at all of the alteration. Then, with a final decision imminent, Pliura Intervenors discovered that Enbridge had earlier secretly decided to change the proposed project from what had been presented in the 07-0446 Final Order and what had been previously affirmed by this Court in *Pliura Intervenors v Ill. Commerce Cmm'n*, 405 Ill. App. 3d 199, 942 N.E.2d 576, 347 Ill. Dec. 373 (4th Dist. 2010). Pliura Intervenors learned Applicant had surreptitiously changed the project without disclosing that fact in its application for eminent domain. The 07-0446 Order granted Enbridge the authority to construct operate and maintain

a 36-inch diameter pipeline the Appellate Court affirmed the Certificate on the basis of Enbridge's evidence of public benefit related to the transportation of 400,000 to 800,000 BPD of Canadian Heavy Crude to the Patoka hub and on to Midwestern refineries specially adapted to accept this product. But that all changed. Pliura Intervenors discovered that Enbridge no longer intended to build that pipeline but instead was building a smaller 24-inch diameter pipeline. The new project was designed primarily for the purpose of transporting light crude oil from North Dakota to conventionally configured refineries. Pliura Intervenors argued that this newly discovered alteration completely obviated the previous evidentiary findings underpinning the 07-0446 order and created a legal absurdity where the instant application sought Eminent Domain authority for the 36-inch Canadian heavy crude pipeline when Enbridge was admittedly no longer pursing that project.

Notwithstanding this new revelation and without addressing it at all, the Commission issued its Final Order herein granting Eminent Domain authority to Enbridge for the purpose of acquiring the necessary right-of-way easements to construct, operate and maintain the now-abandoned project approved in ICC Docket 07-0446. Utilizing that authority, IEPC has filed dozens of Eminent Domain complaints against the remaining landowners, even though it has admitted through multiple responses to requests to admit facts that it has no intention of building the 36-inch pipeline that was approved in 07-0446 and for which the eminent domain authority was granted.

Then, and only then, on May 19, 2014 Enbridge filed a motion to reopen and amend the Final Order in 07-0446 to allow for the change in diameter and product. This filing was preceded by *ex parte* communications between Applicant and Staff. After Pliura Intervenors discovered and disclosed the project alteration, the Staff contacted Applicant to learn the

details. Staff and Applicant then held a series of *ex parte* communications never disclosed in the 07-0446 docket or the 13-0446 docket. The Staff submitted a list of questions it wanted addressed in a motion to amend. Applicant and Staff then apparently exchanged draft answers to the questions and staff "previewed" the motion to amend. The purpose of this "preview" is unknown but it certainly calls into question the integrity and impartiality of the process. More shocking, Staff submitted data requests to Applicant to address the alteration and submitted draft answers to the Applicant, designed to minimize staff inquiry and scrutiny of the motion. None of these *ex parte* communications were known previously to the Intervenors in 07-0446 or 13-0446.

Enbridge now requests that the Certificate granted in the Order entered July 8, 2009 be amended to authorize a pipeline of "24 inches" rather than a "36-inch pipeline." In its Motion to Reopen and Amend Order, Enbridge concedes that "the Southern Access Extension Pipeline" ("SAX" pipeline) was conceived to utilize a 36-inch pipe to move mainly so-called "heavy" crude per anticipated supply patterns (Motion to Reopen at 2); that shipper interest in moving heavy crude to the Patoka Hub, manifested in 2006-2007, thereafter became uncertain due to economic conditions; and that Patoka became significant to shippers of light oil sought by refineries capable of processing it. (*Id.* at 5)

Applicant further asserted that Marathon Petroleum Company L.P. ("Marathon"), "which operates three PADD II refineries, including one in Robinson, Illinois, that are reachable via the Patoka Hub," has now committed to have Enbridge move light crude to Patoka via the SAX pipeline in order to supply these refineries; that Marathon has contracted for enough of the line's initial capacity to warrant construction of the line; that other shipper interest in moving light oil to Patoka also has been made known to Enbridge; and that in

addition, there continues to be the potential to move some volume of heavy crude to Patoka for further transport. (*Id.*) What Applicant did not include, however, was that a subsidiary of Marathon has also purchased a 35% ownership interest in the SAX.

Applicant also stated that "in the circumstances, and as part of the Light Oil Market Access Program, Enbridge Illinois has determined that the appropriate initial capacity of the SAX pipe line is now 300,000 bpd, a volume that can be readily accommodated by a 24-inch outside diameter pipeline." (*Id.* at 5-6)

On June 26, 2014, the Commission reopened the proceeding "pursuant to Section 10-113(a) of the Public Utilities Act and 83 Ill. Adm. Code 200.900, for the limited purpose of allowing Parties to address whether the Order should be amended in the manner described in the Motion to Reopen and Amend Order… ," as stated in a corrected notice of Commission action issued June 27, 2014. It is noted that 83 Ill. Adm. Code 200.900 is titled, "Reopening *on Motion of the Commission*." It provides in part that after issuance of an order by the Commission, the Commission may, *on its own motion*, reopen any proceeding…" (emphasis added)

Applicant requested that the Motion to Reopen and Amend Order be decided without a hearing. That request was not granted. Pursuant to due notice, the matter was set for a prehearing conference, and subsequently was set for an evidentiary hearing. Evidence presented by Applicant consists of the content, other than legal opinions, of its Motion to Reopen and Amend Order (IEPC Ex. 1) and its Reply on Motion to Reopen and Amend Order (IEPC Ex. 2). No other evidence was presented. The Applicant's sponsoring witness was cross-examined at the hearing by attorneys for Pliura Intervenors and Turner Intervenors.

Staff filed and presented the testimony and exhibits of Mark Maple, who was cross-examined by Pliura Intervenors and Turner Intervenors.

Pliura Intervenors filed and presented the testimony and exhibits of Carlisle Kelly, and Turner Intervenors filed and presented the testimony and exhibits of Timothy Kraft. Except for one item, the Kelly and Kraft testimony and exhibits were admitted over the objections raised in motions to strike filed by Applicant.

Following the various briefings provided for by the Rules of Practice (83 Ill. Adm. Code Section 200), a Final Order was entered on December 17, 2014, (and served on December 18, 2014) granting the motion to amend, but imposing certain conditions including a limitation on the ownership stake Marathon and its subsidiaries would be permitted for the SAX and a limitation on the pipeline volume that could be committed to Marathon and its subsidiaries.

ISSUES REQUIRING REHEARING

With all due respect to the Illinois Commerce Commission, Pliura Intervenors must respectfully take issue with the Final Order on several points.

1. The Final Order errantly grants Applicant the right to construct, operate and maintain a 24-inch liquid petroleum pipeline primarily for the purpose of transporting domestic light crude when there is no evidence of record to support a public need or public benefit for this project.

No amount of obfuscation, back-peddling and revisionist history can escape the reality this the original Certificate in Good Standing was issued to permit IEPC to construct, operate and maintain a 36-inch/400,000 BPD pipeline for the purpose of primarily transporting Canadian Heavy Crude for multiple independent shippers in common carriage. Expert testimony was presented as to the economic benefit of this proposal. The Commission relies upon this

evidence and the Applicant's representations in granting the Certificate. The Appellate Court relied upon this same evidence to affirm the Certificate.

The July 8, 2008 Final Order granting the certificate stated at pages 18-19, among other things:

> "According to Enbridge Illinois, Illinois and Midwestern refiners, as well as those in other areas, have increasingly sought to secure crude from Canadian sources in order to meet the public demand for refined petroleum products. Enbridge Illinois suggests this is the case because crude petroleum produced in western Canada is economically attractive to Illinois and other American refiners, exists in ample supply, and constitutes a reliable and secure resource for them. By contrast, Enbridge Illinois claims non-Canadian supply sources, including domestic American fields, have dwindled, become insecure or unreliable, or have been diverted to foreign markets. Enbridge Illinois asserts that U.S. imports of Canadian crude doubled in the period 1998-2003 and more than one million barrels per day are now imported into PADD II markets, approximately 70% of the region's crude petroleum imports. (Enbridge Illinois Initial Brief at 8-9)"
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> "According to Enbridge Illinois, numerous Illinois and Midwestern refiners are increasingly looking to Canadian production to supply significant portions of the crude they need. Enbridge Illinois contends this is because Canadian supplies, including heavy crude such as that produced in the Alberta oil sands region, offer an attractive alternative to other possible sources of supply. Enbridge Illinois says domestic American onshore production has been declining for decades and will continue to do so. Enbridge Illinois states that Gulf-produced crude, although important, is not projected to be a source of continuously increasing supply into the Midwest and Gulf sources; supply systems for both domestic production and foreign imports are vulnerable to hurricane disruptions -- in 2005, two major hurricanes caused significant production and supply problems for Gulf sources of crude. (Enbridge Illinois Initial Brief at 8)"
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> "Enbridge Illinois states that the increasing demand for Canadian crude oil supplies, in conjunction with declining domestic production, has led to significant developments in the common carrier pipeline network serving Illinois and the United States. Enbridge Illinois asserts that existing systems have been found inadequate in capacity and configuration to meet market needs; apportionment (rationing) of transport capacity as well as inefficient routing have resulted. In order to adequately serve the American markets seeking Canadian crude, Enbridge Illinois says producers and shippers have looked to pipeline companies to modify and/or expand their systems to overcome these problems and serve their needs by matching suppliers to markets."

> "In order to do so, and to prevent projected shortfalls of pipeline capacity, Enbridge Illinois claims various pipelines have been reversed and new pipelines proposed. Enbridge Illinois says the Southern Access Expansion Pipeline and the Southern Lights Pipeline are part of this process. When completed, Enbridge Illinois claims they will facilitate the delivery of increased supplies of Canadian crude to the Illinois area and the northern parts of the PADD II region. In Enbridge Illinois' view, the Extension Pipeline is the next logical step in meeting the need to connect American refiners to western Canadian suppliers. Enbridge Illinois says it will do so by connecting the facilities of the Enbridge System to the important pipeline-network nexus known as the "Patoka Hub." (Enbridge Illinois Initial Brief at 10-11)"

In addition, much of the testimony that was previously provided in 07-0446 hinged on Enbridge's allegations that its 36-inch pipeline would bring 400,000 barrels-per-day of heavy crude from Canada. In the final order issued by the Commission in ICC #07-0446, at page 18, the Commission noted Enbridge maintained heavy crude was price discounted compared to other sources and that refineries were upgrading their facilities to process heavy crude.

At page 20 of the Commission order, Enbridge alleged:

> "Enbridge Illinois contends that Illinois consumers need as much relief as possible from increasing energy costs. Enbridge Illinois asserts that economic analysis shows that increasing the supply of Canadian crude to Illinois and other refiners will provide substantial economic benefits to Illinois consumers. Enbridge Illinois argues that depending upon market conditions and world oil prices, Illinois consumers may realize hundreds of millions of dollars (at present values) in energy-cost savings due to the Enbridge System's network enhancements, including the Extension Pipeline. (Enbridge Illinois Initial Brief at 12, citing Enbridge Exhibit 3 at 22)"

Enbridge alleged in 07-0446 that increasing the supply of Canadian crude to Illinois would provide economic benefit to Illinois consumers. Now, with the change in the type of product being proposed (light oil versus heavy crude), and with the change in the size of the pipeline from 36-inch down to 24-inch, there is no evidence in the record to support a need for the project, no evidence that it will benefit the public, and no evidence of public necessity.

> "Enbridge Illinois also asserts that growing worldwide demand for oil as well as political volatility have made long-term reliance on Gulf-landed foreign crude increasingly unattractive to domestic users, as has pressure for increasing energy

> independence from overseas (Middle Eastern) sources. Enbridge Illinois argues that because Canadian heavy crude is price discounted, and because Canadian sources have low political risk, are in close physical proximity, generally offer attractive pricing, and promise increasing production, Illinois and other Midwestern refiners are both desirous of securing greater supplies of Canadian crude and have equipped, or are preparing to equip, their refineries to use more Canadian heavy crude in their supply portfolios. According to Enbridge Illinois, the five major Illinois-area refineries -- ExxonMobil in Joliet; BP in Whiting, Indiana; ConocoPhillips/EnCana in Wood River (WRB Refining); CITGO in Lemont; and Marathon in Robinson -- have either upgraded their facilities to process heavy crude or are contemplating doing so. (Enbridge Illinois Initial Brief at 8-9)

The Commission, in its final order approving 07-446, at pages 46-47, noted that

> "As Staff suggests, "bringing Canadian petroleum to this [Patoka] hub would provide not only our state, but our nation, with additional crude oil supplies from a friendly and reliable country." The Commission also agrees with Staff that "Illinoisans are also citizens of the United States, and a project that provides access to a secure and reliable energy supply and helps to meet our country's energy needs is a project that benefits Illinois citizens, whether directly or indirectly" and that "[t]he changing landscape requires us as a nation to re-evaluate our energy supply and transmission network and make sure that it is as reliable and redundant as possible."

Additionally, at page 47 of the final order, the Commission noted:

> "Based on the record in the case, including the location of the pipeline **which would carry Canadian crude** to the major pipeline hub at Patoka, **the capacity of the pipeline**, the current environment as described by Staff, and other evidence presented, the Commission agrees with Staff that there is a public need for the proposed pipeline." (emphasis added)

Similarly, it is clear that the Appellate Court relied upon the evidence of public benefit from moving 400,000 BPD of Canadian Heavy Crude as the basis for its affirmance of the Final Order.

> Enbridge claimed that when completed, the expansion project would allow it to transport an additional **400,000** barrels per day (bpd) to its Pontiac Terminal … Enbridge Pipelines contended that its pipeline extension would, in pertinent part, benefit Illinois by increasing its ability to deliver **Canadian oil** to various Illinois markets and refineries…Enbridge Pipelines asserted that the pipeline extension would afford United States refineries an additional initial capacity of **400,000 bpd**…Enbridge Pipelines further noted that by obtaining and processing **oil from Canada**, refineries would enjoy lower supply costs, dependable sourcing, and expeditious delivery. Enbridge Pipelines claimed

that such advantages benefit Illinois consumers in the form of (1) lower prices for petroleum-based products, (2) increased and consistent oil availability, (3) refinery stability that results in consistent tax revenues for local economies, (4) decreased supply disruptions caused by natural phenomenon such as hurricanes or world insurrection, and (5) additional oil delivery options through increased competition….The director (1) acknowledged that he could not quantify the specific monetary benefit that would accrue to Illinois citizens if the Commission approved the pipeline. extension, but (2) characterized Patoka as an "important crude oil hub" that "will enhance Illinois' position as an important part of this vital transportation network," and (3) stated that the pipeline extension was designed to deliver a maximum of **800,000 bpd.**

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In October 2007, **Enbridge Pipeline's economics expert**, who was retained to provide testimony regarding the benefits Illinois would experience if the Commission granted Enbridge Pipeline's application, filed his written testimony. The expert explained that the pipeline extension was part of the expansion project that Enbridge had undertaken. With regard to that project, the expert noted the following substantial benefits Illinois consumers would enjoy: **(1) a present-value savings of $ 407 million** based on the mitigating effect increased oil production would have on gasoline prices, distillate, and jet fuel; (2) improved regional security as dependency on uncertain oil supplies from South American and the Middle East are replaced by a stable flow of **Canadian oil**; (3) gains in "regional economies" based on planned refinery upgrades, oil storage expansion, and pipeline expansion as the anticipated secure supply of **Canadian oil** replaces the recent history of foreign oil disruptions; (4) a commitment from Illinois refineries to expand their respective facilities to accommodate the additional oil; (5) increased security and safety benefits through local and expanded oil storage facilities; and (6) additional employment opportunities….the expert noted the following: "[T]he [pipeline e]xtension *** is extremely important to Illinois and its consumers. In addition to providing access to a secure source of petroleum for many years to come, the [pipeline e]xtension *** will likely provide Illinois consumers with substantial savings in the event of any crisis that occurs in the future, especially if the tight spare capacity that exists today continues, as is likely, in the future."…

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The expert (1) explained that his $ 407 million present-value-savings estimate was based on the 400,000 bpd that would flow to Patoka--and eventually the "world supply"--if the Commission approved Enbridge Pipelines' application… Relying on this definition, the Commission determined that the pipeline extension would provide (1) Illinois, as well as our nation, additional oil supplies from a friendly ally and (2) access to a secure and reliable energy supply that assists our nation in achieving our energy needs, which benefits Illinois citizens either directly or indirectly… *Pliura Intervenors v Ill. Commerce Comm'n,* 405 Ill. App. 3d 199, 204, 942 N.E. 2d 576, 580 (4th Dist., 2010). (Emphasis added)

The plan is no longer to carry Canadian crude, but is instead proposing to carry Light Crude from areas other than Canada. There is no evidence in the record to support such a project, or even the capacity it is proposing to handle. The record is devoid of any supporting evidence. IEPC offered no evidence whatsoever to support this Application now that its reconfigured project no longer resembles the original Application. It could have provided "replacement evidence" attempting to prove that there is a public need for and public benefit associated with the transportation of 300,000 BPD of domestic light crude to the Patoka hub destined for some PADD II conventional refinery. But it never did this. Thus, the project, as now configured is unsupported by the evidence. The change in the capacity of the pipeline, its primary product, and its primary destination have each irrefutably changed and no new evidence was offered. Decisions of the Illinois Commerce Commission must be supported by substantial evidence upon review of the entire record. Any decision not so supported will be reversed. *Lakehead Pipeline Company v. Illinois Commerce Commission*, 296 Ill. App. 3d 942, 956 (3rd Dist. 1998). The Commission cannot meet its statutory and regulatory obligations if it continues to ignore this critical error.

2. The Final Order errantly grants Applicant the right to construct, operate and maintain a 24-inch liquid petroleum pipeline primarily for the purpose of transporting light crude for its co-owner, Marathon, in spite of the fact that approval of the project requires the pipeline to be operated primarily as a Common Carrier.

The SAX, as originally conceived and approved by the Commission was allegedly a true "common carrier". Applicant presented sworn testimony on this point of Dale Burgess, Director of the SAX project who testified, under oath, in the original proceeding, stating, "Prior to building a 36 inch line Enbridge conducted…an open season. ***Numerous

producers and shippers want to have the Patoka hub. *** Better access to the Patoka hub is important to shippers…because it will make the desired Canadian crude available to more entities that can process it. (Enbridge Ex. 1, pages 5-6).

In his rebuttal testimony, Burgess testified under oath, explaining why the SAX project was different from the Keystone XL project. "84% of Keystone's capacity is committed to shippers via long term capacity contracts.***Only 16% of Keystone capacity will be available to shippers on a spot basis.***In contrast the [SAX] will be a fully open access pipeline.*** Finally, the Keystone project is partially owned by a company that is both a major U.S. refiner and a large producer of Canadian crude oil in contracts to Enbridge with is neither a producer of crude nor a refiner."(Enbridge Exhibit 1a, page, 21).

Burgess was, of course, referring to ConocoPhillips, co-owners of the Keystone XL project. Now the Applicant wishes to turn the testimony and other evidence in 07-0446 on its head. Adopting the Keystone model, we now know through the indefatigable efforts of the Intervenors herein that the SAX, as it has now been surreptitiously reimagined by Enbridge is a completely different project than what Burgess testified to. Now, there is one big shipper accounting for 95% of the committed capacity of the SAX. That one shipper is Marathon, a major refiner and now a co-owner of the SAX. There is just one other small undisclosed shipper committed to this project and little remaining capacity for spot shippers. No longer are "numerous producers and shippers" apparently clamoring for more capacity to move Canadian crude to Patoka. That need, if it ever existed, has evaporated. This project looks nothing like what was approved in the underlying 07-0446 proceeding.

Instead, Marathon Petroleum Company, through a subsidiary, now owns a 35% ownership interest in the SAX and it its anchor shipper. Marathon alone has committed sufficient

volume to justify this project as a proprietary shipper of Marathon product to Marathon refineries. But that, of course, would not give Applicant the right to exercise eminent domain authority. To acquire that coveted right, the Applicant would need to offer its services primarily to the public in common carriage.

But in reaching its decision, the Commission has permitted Applicant to feign common carriage. We know what common carriage is really supposed to look like. Dale Burgess testified to the difference between a true common carrier, as SAX was originally designed to be, and a propriety project like Keystone XL. But now the SAX, as reconfigured, looks like Keystone, with Marathon substituting for ConocoPhillips. A tiny amount of alleged excess capacity, for which there is no market interest or demand, does not make this proprietary project a common carrier. Further, the conditions imposed by the Commission in its final order, whole certainly within its authority, do not resolve this issue. There is simply insufficient capacity available to the public and insufficient evidence of any market demand to find that this project is anything but a proprietary line for Marathon.

Very respectfully, the final order also miscalculates the available capacity for common carriage and misstates the Applicant's efforts to attract interest in common carriage. Applicant represented in its first "Open season" notice (Dec. 12, 2012) that "Enbridge has received sufficient capacity commitments from an anchor shipper [Marathon] to support the 24-inch pipeline as proposed. Enbridge also stated, "The diameter of the pipeline could be increased, depending on the results of the Open Season." In its second Open Season Notice, (June 5, 2013) Applicant stated, "Enbridge has received sufficient capacity commitments through the first Open Season held December 12, 2012, to January 18, 2013, to support the 24-inch pipeline as proposed." And again stated, "The diameter of the pipeline could be

increased, depending on the results of the Open Season." There is no actual evidence in the record as to what the true capacity of the 24-inch pipeline is, though the number 300,000 BPD has been tossed around. But we know that Marathon alone, as the anchor shipper and co-owner, has committed to enough capacity to justify the entire project. And we know that after two open seasons, there was no additional interest (or at least not enough to justify any increase in the capacity.) FERC required 10% of the capacity of the pipeline to be reserved for uncommitted shippers, but none have materialized. There is no other interest in this project. The final Order, at page 52, "With respect to the 90,000 bpd that is available, it appears that the Applicant is actively seeking commitments from shippers other than Marathon through open seasons, while also reserving 10% of the total capacity for uncommitted volumes. That is, Applicant is holding itself out to provide service to additional shippers." Very respectfully, there is no evidence of this whatsoever in the record. The only evidence is that Co-Owner marathon, alone has committed to ship sufficient volume of its own product to its own refineries to, by itself, justify this project. There is elusive evidence of an unnamed phantom shipper of a *de minimis* volume. Whereas Applicant has steadfastly refused to identify this shipper, even *in camera*, it should be ignored. We have only Co-Owner Marathon justifying the entire project and two failed open seasons seeking additional interest. There is no evidence in the record that Applicant is actively seeking commitments from shippers other than Marathon through open seasons, while also reserving 10% of the total capacity for uncommitted volumes. There is no evidence that there is any interest at all in the 60,000 BPD of remaining capacity for non-proprietary committed shippers or the 30,000 BPD that FERC requires to be held for "spot shippers". There is no evidence that Applicant is pursuing other shippers. The only evidence of record is that Marathon's

commitment is all this project needs for viability. Any assertions that this project remains a common carrier by pipeline or that it is primarily for a public purpose are false.

3. The Final Order errantly grants Applicant the right to construct, operate and maintain a 24-inch liquid petroleum pipeline when the original Certificate in Good Standing issued in 2009 expired or was abandoned by Applicant long before the instant motion to reopen and amend was filed.

Section 15-401, under which the Applicant was granted the original Certificate in Good Standing in 07-0446 states, in pertinent part,

> Sec. 15-401. Licensing. (a) No person shall operate as a common carrier by pipeline unless the person possesses a certificate in good standing authorizing it to operate as a common carrier by pipeline. No person shall begin or continue construction of a pipeline or other facility, other than the repair or replacement of an existing pipeline or facility, for use in operations as a common carrier by pipeline unless the person possesses a certificate in good standing.
>
> (b) Requirements for issuance. The Commission, after a hearing, shall grant an application for a certificate authorizing operations as a common carrier by pipeline, in whole or in part, to the extent that it finds that the application was properly filed; a public need for the service exists; the applicant is fit, willing, and able to provide the service in compliance with this Act, Commission regulations, and orders; and the public convenience and necessity requires issuance of the certificate. … 220 ILCS 5/15-401 (emphasis added)

It is clear, then that in order to receive a Certificate in Good Standing, the Commission is required, as an element of that certification, to find public convenience and necessity. Without a finding by the Commission of public convenience and necessity, no Certificate in Good Standing can issue.

Recall that under the Public Utilities Act, Enbridge's proposed pipeline is defined by statute as a public utility as a conveyance of oil or gas by pipe line. (220 ILCS 5/3-105a(3)). Recall also that in the 07-0446 proceedings that were the subject of the prior appeal to this court in *Pliura Intervenors v. Ill. Commerce Comm'n*, 405 Ill. App. 3d 199, 942 N.E.2d 576, (4th Dist. 2010), Enbridge sought certification of public convenience and necessity.

Turning then to Section 8-406, we find additional statutory requirements with respect to public convenience and necessity. Most relevant to the instant proceeding are subsections (a), (b) and (f), which state,

> Sec. 8-406. Certificate of public convenience and necessity.
>
> (a) No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State as of July 1, 1921 and not possessing a certificate of public convenience and necessity from the Illinois Commerce Commission, the State Public Utilities Commission or the Public Utilities Commission, at the time this amendatory Act of 1985 goes into effect, shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.
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> (b) No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or any extension or alteration thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction. Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.
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> (f) Such certificates may be altered or modified by the Commission, upon its own motion or upon application by the person or corporation affected. Unless exercised within a period of 2 years from the grant thereof authority conferred by a certificate of convenience and necessity issued by the Commission shall be null and void.
>
> No certificate of public convenience and necessity shall be construed as granting a monopoly or an exclusive privilege, immunity or franchise. (Emphasis added) 220 ILCS 5/8-406 (a), (b) and (f).

Read together in context, the Certificate of Good Standing issued under 15-401 required a certificate of public convenience and necessity. The proposed pipeline is defined as a public utility under the statute (220 ILCS 5/3-105 a(3)). Section 8-406(b) requires that public utilities must have obtained from the Commission a certificate of public convenience and necessity before starting construction on the project. No portion of Section 8-406 indicates common

carrier pipelines are exempt from the requirements set forth therein. 8-406 applies to public utilities, including pipelines for public use.

Under Section 8-406(f), the certificate of public convenience and necessity was only valid for two years. Once two years passed without commencement of the project, that public convenience and necessity determination expired and therefore so did the Certificate in Good Standing.

The Certificate in Good Standing, with its integral certificate of public convenience and necessity, was issued by the Commission on July 8, 2009. (R. C00802 and ICC Docket 07-0446, Order at 70) Again it is noted that in spite of the prior appeal to this Court and other litigation between Enbridge and certain landowners in U.S. District Court, no stay was ever requested or issued that would have prevented Enbridge from proceeding with the pipeline approved in 07-0446. Its decision to not proceed was entirely a unilateral business decision. By Enbridge's own admission, this project was suspended in 2009 due to the "Great Recession" (R. C-00876) and was not taken up again, even in the materially altered form, until sometime in 2012. Thus, Enbridge's own admission verifies that it did not exercise the certificate of public convenience and necessity within a period of two years from when it was granted on July 8, 2009.

4. The Commission failed to require the reopening of the related Final Order in ICC Docket 13-0446 to resolve the inconsistencies between the Final Order therein and the now amended Final Order herein.

It is irrefutable that the Final Order in 07-0446 issued in 2009 granted Applicant the authority to construct, operate and maintain a 36-inch diameter pipeline. Nothing more, nothing less. It is equally irrefutable that no evidence or acknowledgement was offered by Applicant in the 13-0446 proceedings that a 24-inch diameter pipeline was being considered

or constructed. When the 13-0446 order granting eminent domain authority was entered, it granted that authority solely for the 36-inch pipeline approved in the 07-0446 Order. Nothing more. Nothing less. The 13-0446 Order was never reopened. Applicant has taken the untenable position that the granting of its motion to amend the 07-0446 order would somehow, as if by magic, retroactively amend the 13-0446 order. But there is no authority to support such a position.

The Final Order intentionally ignores this issue. It states, "The Commission finds that its decision in Docket 13-0446 is not before the Commission in the current reopened proceeding in Docket 07-0446. Accordingly, findings sought by Intervenors regarding the proceedings and Order in Docket 13-0446 will not be made in this Order. Likewise, the finding sought by Applicant regarding Docket 13-0446 will not be made in this Order."

This refusal to address the issue leaves to the Appellate Court the business of sorting out the effect of the amended 07-0446 order upon the authority granted in the unamended 13-0446 order. The Commission has the authority under 83 Ill. Adm. Code 200.900 to reopen the 13-0446 Final Order to resolve this contradiction. The Applicant has already secured the reopening of the 07-0446 Order and presumably could have sought a reopening of the 13-0446 Order as well. It is, of course, not the place of the Intervenors who opposed the 13-0446 order to now seek to have it amended to clarify its applicability to the amended 07-0446 order. It is the position of the Intervenors herein that the unamended 13-0446 order is now moot since it granted eminent domain authority only for the acquisition of right-of-way grants necessary for the construction, operation and maintenance of the 36-inch diameter pipeline approved in the unamended 07-0446 Final Order. This position is supported by the findings of the Final Order herein but the order's lack of clarity on this point does not serve the

interests of the Commission or the parties. Rehearing to clarify this issue is of critical importance.

5. The Commission failed to maintain a complete record of the proceedings by denying Pliura Intervenors' Motion to Supplement the Record herein with the entire 13-0446 Record so that a) the full history of these proceedings would be before the Commission and any reviewing court and b) the inconsistencies between the two Final Orders could be addressed and resolved.

In a related point, Pliura Intervenors previously moved that the 13-0446 record be included within the current report so that the Commission and the appellate Court has before it the entire record of these proceedings. This is particularly important for the Commission so that it can address with clarity the point raised in Point No. 4 above. It is also vitally important for the Appellate Court to have before it a complete record where the interplay between the 07-0446 Final, the 13-0446 Final Order and the instant Final Order on Reopening has been left to the Appellate Court for resolution. The Final Order herein notes that Section 200.640 of the Commission's rules specifically discourages requests for administrative notice of transcripts, exhibits, pleadings and other matter of other docketed proceedings.
But 200.640 A also states, "the Commission or Hearing Examiner may take administrative notice of the following: *** Contents of certificates, permits and licenses issued by the Commission, and the orders, transcripts, exhibits, pleadings or any other matter contained in the record of other docketed Commission proceedings." And Intervenors are not seeking supplementation of the instant docket with records from an unrelated but arguably similar proceeding. The 13-0446 record involves this very project, this very Applicant, and many of the same Intervenors. The 13-0446 docket only exists because the Commission allowed a second filing to reconsider its initial denial of Eminent Domain authority. Treating the 13-

0446 docket as a separate proceeding bearing no relevance on the instant proceeding is simply untenable and operates only to handicap the complete and thorough review of the Orders.

Finally on this point it must be noted that Intervenors do not seek to make an impermissible collateral attack on the 13-0446 Final Order. These legal buzz words have been repeatedly thrown about by Applicant but it is simply not correct. The effect of the instant order on the 13-0446 order is a valid question with enormous implications for the scores of landowners now subject to condemnation proceedings. If Applicant has mooted its authority, as Intervenors posit, the Commission should address this issue on rehearing and the Appellate Court should have before it a complete record on review.

6. The Commission erred in not discounting the recommendations of Staff in light of the evidence of partiality disclosed by the *ex parte* communications.

Intervenors persist in their position that the ex parte communications between Staff and Applicant were improper. Under 5 ILCS 430/5-50(e), the Illinois Commerce Commission is specifically named as one of the agencies to which the rules on disclosure of ex parte communications under the State Officials and Employees Ethics Act, 5 ILCS 430/5-5, *et seq.*, applies. That Act, at subsection 5/50 (b-5) mandates that an ex parte communication received by an agency, agency head, or other agency employee from an interested party or his or her official representative or attorney shall promptly be memorialized and made a part of the record. A failure to do so is a violation of the Act (5 ILCS 430/5-50(f)).

Similarly, under the Illinois Administrative Procedure Act, 5 ILCS 100/1-1, *et seq*., at subsection 10-60 (a), agency heads, agency employees, and administrative law judges shall not, after notice of hearing in a contested case or licensing to which the procedures of a contested case apply under this Act, communicate, directly or indirectly, in connection with

any issue of fact, with any person or party, or in connection with any other issue with any party or the representative of any party, except upon notice and opportunity for all parties to participate. Under subsection 10-60(c), an ex parte communication received by any agency head, agency employee, or administrative law judge shall be made a part of the record of the pending matter, including all written communications, all written responses to the communications, and a memorandum stating the substance of all oral communications and all responses made and the identity of each person from whom the ex parte communication was received. Neither act was complied with. The Final Order errantly accepts the position of Staff and Applicant that the inarguably ex parte communications were proper and exempt from the disclosure requirements under 220 ILCS 5/10-103 and 83 Ill. Adm. Code 200.710.

Irrespective of whether a violation of law has occurred, the existence of even arguably technically exempt *ex parte* communication in these hotly contested proceedings calls into question the independence and impartiality of the Staff.

The Final Order herein goes on to state,

> "The Commission also finds that the arguments in Intervenors' briefs, and the number and nature of the examples of ex parte communications alluded to or included therein, do not support a finding that ex parte communications between Applicant and the ICC Staff have corrupted or tainted the hearing process, or compromised the integrity of the process. Accordingly, the motions to dismiss based on such arguments are denied. To the extent other parties question Staff's impartiality, they have the discretion to so argue and to further argue that the Staff recommendation should be given no weight; here, on Reopening the Intervenors here have done so in their briefs. They were given broad latitude in cross-examining the Staff witness in this regard. In addition, and over the objections of Applicant and Staff, Pliura and Turner Intervenors were allowed to supplement the evidentiary record with documents attached to motions filed weeks after the cross-examination of witnesses was concluded. (Final Order at 54-55)

But the Order fails to properly acknowledge the sequence of events. At the time the Staff Witness, Mr. Maple, was cross-examined on September 11, 2014, Intervenors were aware of

just the proverbial tip of the iceberg with respect to *ex parte* communications. Staff had offered a data request response that gave very little information and nearly no documentation. This is all that was at hand when the cross-examination took place. Over a month later, page upon page of emails were uncovered through a circuit court subpoena. Irrespective of latitude, it was, of course, temporally impossible to have cross-examined Mr. Maple on September 11, 2014 about ex parte communication that were not discovered until October 14, 2014. Thus, cross-examination was severely limited and post-hearing Argument was prejudicially hampered. Due process principles apply to administrative proceedings. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 92, 606 N.E.2d 1111, 180 Ill. Dec. 34 (1992). Due process requires that the opportunity to be heard occur in a meaningful manner. *Lyon v. Dep't of Children & Family Servs*., 209 Ill. 2d 264, 277, 807 N.E.2d 423, 433, 282 Ill. Dec. 799, 809 (2004). Intervenors' due process rights have been impaired. Either the testimony of Mr. Maple and the Staff recommendation in support of the motion to amend should have been disregarded or Intervenors should have been granted the right to reopen the evidentiary proceedings and subjected staff to further cross examination. But the motions to reopen were denied. Respectfully, Intervenors seek reversal of the Final Order or rehearing so that a proper inquiry of Staff can be made.

7. Given the totality of the facts related to these proceedings, the Commission errantly granted the motion to amend when it should have instead, initiated proceedings to revoke the original 07-0446 Certificate in Good Standing and the related 13-0446 Grant of Eminent Domain Authority.

In *Quantum Pipeline Co. v. Illinois Commerce Comm'n*, 304 Ill. App. 3d 310; 709 N.E.2d 950 (3rd Dist., 1998), the petitioners filed an application with the Commission seeking authorization to build a pipeline from Clinton, Iowa, to Morris, Illinois. One landowner

sought to intervene, but the Commission denied the petition as untimely. Subsequently, the Commission waived a hearing and granted the petitioners' certificate of public convenience and necessity after finding that a public need existed. The petitioners then negotiated with private landowners for the easements required to build the pipeline. Due to an inability to obtain easements from all of the landowners, the petitioners sought eminent domain power under section 8--509 from the Commission. Thirty-four landowners sought leave to intervene in the eminent domain proceeding. After the time to petition the Commission for a rehearing on its grant of petitioners' certificate expired, the Commission's staff filed a report to the Commission requesting that the Commission reopen the certificate proceeding pursuant to section 200.900 (83 Ill. Admin. Code § 200.900 (West 1992)). Section 200.900 allows the Commission to "reopen any proceeding when it has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, such reopening." The Commission's staff stated that "[the] public interest requires such reopening" due to the number of petitions to intervene in the petitioners' request for eminent domain authority. The Commission then entered an order initiating a proceeding to reopen the evidentiary record to determine "whether it will rescind, alter, amend or allow to stand as originally entered" its order granting the petitioners' certificate. This new proceeding was consolidated with the eminent domain proceeding.

In the consolidated proceedings, the petitioners presented the same evidence in support of their certificate that they submitted nine months earlier in the original proceeding, in addition to evidence supporting their request for eminent domain authority. The Commission's staff and various intervening landowners also submitted testimony to the Commission. A sharply divided Commission entered an order rescinding the petitioners'

certificate that was previously issued after concluding that the proposed pipeline was likely to only serve the petitioners' private needs and, further, that a public need for the pipeline did not exist. Because the Commission rescinded the certificate, it did not consider the propriety of the petitioners' request for eminent domain authority. *Quantum,* 304 Ill. App. 3d at 313-314.

The Appellate Court determined that the Commission had the authority to rescind the Certificate previously issued to Quantum, but that because Quantum had a liberty interest in the previously issued Certificate; it was entitled to due process in the revocation proceeding. Because the Court found that the Commission had failed to fully afford Quantum due process when it used a Commission-initiated motion to alter or modify as a revocation proceeding, the rescission was vacated. *Quantum* is important to this instant case for two reasons. Firstly it establishes the Commission's authority to seek rescission of a previously granted certificate when the subsequent evidence demonstrates that a once-certified project no longer constitutes a public benefit. That is exactly what has occurred herein. The SAX, as certified, was markedly different than its current conception. Secondly, *Quantum* establishes that the proper procedure for revoking a certificate due to changes in public benefit falls under 220 ILCS 5/10-113. Very respectfully, the Final Order on Reopening reaches the wrong conclusion. Instead of conditionally granting the amendment in pipe diameter, the amendment should be denied and the Commission should, on the basis of the evidence adduced in these proceedings, follow the direction of Quantum and proceed with a revocation proceeding under 220 ILCS 5/10-113.

ADOPTION OF THE APPLICATIONS FOR REHEARING OF THE PARTIES

Finally, Pliura Intervenors acknowledge that 220 *ILCS* 5/10-113 (a) permits only a single Rehearing to be granted by the Commission. To the extent that any other parties file separate Applications for Rehearing, Pliura Intervenors hereby adopt and incorporate those additional Applications and the issues raised therein so that in a single rehearing, the concerns of all stakeholders may be considered.

CONCLUSION

By reason of the forgoing, Pliura Intervenors respectfully urge the Illinois Commerce Commission to grant this Application for Rehearing and amend the Final Order as urged herein.

Respectfully Submitted,

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PROOF OF SERVICE

The undersigned certifies that on this 9th day of January, 2015, he served a copy of the foregoing document together with copies of each Petition to Intervene upon the individuals on the attached service list, by electronic mail.

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